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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re S.S., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.B.,

Defendant and Appellant.

D075461

(Super. Ct. No. NJ13655)

APPEAL from an order of the Superior Court of San Diego County, Edlene C.

McKenzie, Judge. Affirmed.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, Caitlin E. Rae, Chief Deputy County Counsel, and Tahra Broderson, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

A.B. (Mother) appeals from an order of the juvenile court terminating her parental rights as to S.S. and setting a permanency plan of adoption. (Welf. & Inst. Code, § 366.26.)¹ Mother argues the juvenile court erred by finding the benefits of adoption outweighed the benefits of her relationship with S.S. and thus declining to apply the beneficial parent-child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). We conclude there is substantial evidence to support the juvenile court's findings regarding the parent-child relationship and the court did not abuse its discretion in declining to apply the exception in this case. We therefore affirm the order.

II

BACKGROUND

A

Mother had a difficult childhood and has an extensive history of substance abuse dating back to her teenage years. Mother's first child was placed in a permanent plan of legal guardianship in 2003 due to Mother's methamphetamine use. Mother sought treatment for her addiction in 2006, when she was pregnant with the second child, but was not successful, and her parental rights as to her second child were terminated as a result.

¹ All further statutory references are to the Welfare and Institutions Code.

B

Mother conceived S.S. while participating in a residential substance abuse program and remained sober throughout her pregnancy. After treatment, Mother obtained her own apartment but was evicted six months later and left S.S. with his godparents for several months while she looked for housing.

In 2014, when S.S. was two years old, the San Diego County Health and Human Services Agency (the Agency) began receiving reports concerning his well-being. In October, S.S. was left unsupervised outside the apartment complex and the apartment manager found Mother passed out on her bed, unaware S.S. was gone. In 2015, Mother became homeless again and signed over guardianship of S.S. to his godparents for several months. In April 2016, Mother's boyfriend, V.E.², was arrested after charging at Mother and knocking her down in front of S.S.

In May 2016, Mother had another child, V.A., with V.E.³ In July, the Agency received a report Mother and V.E. were using methamphetamine in the home with S.S. and V.A. present, V.E. was verbally abusive to S.S., and the apartment was unsanitary and did not have electricity. The Agency conducted an unannounced visit, but Mother and V.E. refused to answer the door, so a police officer used a key provided by the

² V.E.'s full initials are V.E.A. but we refer to him herein as V.E. to avoid confusion with minor child V.A. No disrespect is intended.

³ V.E. and V.A. are discussed to the extent relevant to the dependency proceedings, but neither's rights are at issue in this appeal. Further, V.E. is not S.S.'s biological father. Mother identified C.S. as S.S.'s biological father, but DNA testing confirmed he was not. His parental rights also are not at issue.

apartment manager to gain access. The apartment smelled strongly of marijuana and the police found a pipe on a shelf in the kitchen containing methamphetamine residue. They also found a pocket knife in the bed the children slept in, a machete-style knife on the kitchen counter, and two lighters in areas accessible to S.S. Mother admitted using methamphetamine and stated she had relapsed a few weeks before and had been using up to three times a day.

C

The Agency filed a juvenile dependency petition on behalf of S.S. on July 25, 2016. The juvenile court found the Agency had made a prima facie showing removal of S.S. from Mother and V.E.'s care was necessary pursuant to section 300, subdivision (b), and granted Mother liberal supervised visitation.

During an interview conducted by the social worker in August, Mother stated she had been sober throughout her pregnancy with V.A. but relapsed sometime around the end of May after finding out the family was being evicted. She said she and V.E. had both used methamphetamine but had taken turns smoking it at a neighbor's apartment so the children would not be present or left alone. She admitted caring for the children under the influence of narcotics but claimed V.E. was always there as well. Mother admitted herself into an inpatient substance abuse facility and visited with S.S. regularly.

In September 2016, the juvenile court made true findings and sustained the petition. The Agency reported Mother was doing well in treatment and the court gave the social worker discretion to lift supervision and allow overnight visits and a 60-day trial visit. By January 2017, Mother had graduated from her inpatient recovery program and

began having overnight visits with S.S. S.S. often asked when he would be able to spend all his nights with Mother and his caregivers noted he was having a hard time separating from her. In February, S.S. began a 60-day trial visit with Mother. The social worker observed Mother with S.S. on many occasions and noted it was always positive. In March, the court placed S.S. and V.A. with Mother but ordered continued services as Mother still needed to establish she could maintain her sobriety long term.

V.E. completed his own recovery and moved in with Mother and the children at Mother's recovery center in May. Shortly thereafter, the family was asked to leave due to multiple rule violations. They moved in with V.E.'s mother while waiting for alternative housing to become available. The Agency expressed concern as Mother had previously relapsed after losing housing, but Mother assured the Agency she would make it a priority to stay in contact with her support network. The juvenile court continued the case for an additional six months and set another family maintenance review for March 2018.

On September 28, 2017, the Agency made an unannounced visit to V.E.'s mother's home after being unable to reach Mother for several days. V.E.'s mother reported the family had moved out a couple days earlier and, while there, Mother often slept until afternoon and did not take S.S. to school. Mother contacted the Agency on October 3 and said they were staying in a hotel but it was difficult financially to take S.S. to school each day. The Agency asked Mother to drug test and the test was negative.

On October 24, 2017, Mother and V.E. got into a fight at an orientation for a shelter. The shelter told Mother she needed to leave and she initially refused, but

eventually left with S.S. after speaking with the social worker. V.A. remained with V.E. On November 7, 2017, Mother reported she had moved in with the mother of V.E.'s oldest child and had enrolled S.S. at the nearby elementary school, but on November 17, the Agency learned S.S. had not been in class since November 9 and the roommate had not heard from Mother in a week. On November 21, Mother tested positive for methamphetamines. She tested negative on December 5 but positive again on December 14 and admitted using methamphetamine the day before.

Mother had left S.S. with her support person, L.G., when she used on December 13. L.G. believed Mother had asked her to watch S.S. because Mother was homeless and was unaware of Mother's court case or her relapse. L.G. agreed to care for S.S. until the next court date and further agreed she would not let Mother come over during that time.

On December 15, Mother informed the social worker her father had passed away and the social worker agreed to give her a ride. The social worker noticed Mother's eyes were restricted and Mother admitted to using methamphetamine that morning. Mother told the social worker she had been using methamphetamine on and off since mid-November and had relapsed after learning she and S.S. would be homeless again. She said she dropped S.S. off with L.G. each time she used and would wait a day or two before picking him back up. She did not think her relapse had any effect on S.S. because he was happy with L.G. Mother said she was done using and called a residential treatment program to request a bed.

The social worker also spoke to S.S. on December 15. His demeanor was more relaxed than in past interviews and he said he liked it at L.G.'s house. The Agency filed a

supplemental petition pursuant to section 387 asserting Mother was no longer able to provide adequate care for S.S. and the juvenile court again removed S.S. from Mother's care and placed him with L.G.

D

The social worker saw S.S. at L.G.'s on December 21; he appeared happy and stated he loved "mama" L.G. L.G. reported Mother came to her house to visit with S.S. on Christmas day and it had been difficult. S.S. cried the majority of the visit and kept repeating, "Mommy is getting better." She said S.S. stopped following instructions after the visit and she did not want Mother to visit her home anymore because she wanted it to be a safe space for S.S.

On December 26, Mother called the social worker. She said she had been clean for six days, but she was slurring her words. Mother said she had "let go" of all of her and S.S.'s possessions because it was too much to deal with and asked for a ride to a residential treatment center. Mother entered treatment again and visited with S.S. in a supervised setting once a week. The social worker noted the visits were positive. Mother and S.S. consistently greeted one another with hugs, Mother encouraged S.S. to do his homework, and S.S. was able to transition back to L.G. without issue. Mother also spoke to S.S. most days on the phone.

In a report dated February 15, 2018, the Agency concluded it would be detrimental for S.S. to return to Mother's care given Mother's continued methamphetamine use despite 17 months of services and recommended a section 366.26 hearing to establish

permanency for S.S. On March 2, 2018, the juvenile court set a section 366.26 hearing for June 27, 2018.⁴

The Agency met with Mother, S.S., and L.G. on May 21, after Mother completed her residential treatment program. L.G. said she was willing to provide legal guardianship to S.S. but when the Agency informed her it would be seeking adoption, she said she was not able to provide long-term care for S.S.

On May 24, 2018, the social worker observed a visit between Mother and S.S. at a local park. Mother provided a blanket, snacks, and portable DVD player and S.S. spent the majority of the visit on the blanket. At a subsequent visit on June 7, 2018, S.S. spent the majority of the visit playing with Mother's cellphone while Mother lay on the blanket next to him. When Mother informed S.S. the visit was ending, he began to cry and refused to help her pack up.

On June 27, 2018, the Agency asked the juvenile court to continue the 366.26 hearing so it could identify a permanent plan for S.S. Mother requested the Agency place S.S. with his previous foster family, where he had been placed from September 2016 through February 2017. The previous foster parents had kept in touch with Mother since the last placement and expressed an interest in caring for S.S. as well. When Mother told S.S. she had contacted them, S.S. responded, "Yeah I want to live with them," and later added, "[a]nd maybe I can come visit you. Maybe we can watch movies together."

⁴ Mother filed a notice of intent to file a writ petition, but the matter was dismissed after appointed counsel found no arguable issues.

On July 11, L.G. informed the Agency she was no longer able to care for S.S. The next day, the Agency filed another supplemental petition pursuant to section 387 alleging S.S.'s placement was no longer effective.

E

S.S. was placed with the previous foster family. He remembered the family and their pets and adjusted quickly.

The Agency informed Mother of the placement on July 13, 2018 but did not hear back for several days. On July 18, Mother cancelled a visit with S.S. and stated she was ill. She resumed weekly visits a couple weeks later. The visits were at a library, but the monitor reported Mother frequently sat outside with S.S. and allowed him to use her phone or a portable DVD player. Mother also had three phone calls a week with S.S. S.S. was excited to talk to Mother and they would pray together at the end of the call.

Mother requested additional visitation with S.S., but then changed her phone number and did not inform the Agency of the change. During a visit with S.S. on August 11, Mother rested her eyes periodically while S.S. played on a computer. She said she was tired from having worked an overnight shift. When S.S. said he wanted to go with her at the end of the visit, she said "I know, Papa, soon." The monitor attempted to encourage Mother to use the time with S.S. more effectively, but Mother became frustrated and stated, "I'm just over it." As Mother walked away, the monitor thought she saw a glass pipe hanging out of Mother's shirt sleeve.

Mother missed the following visit, and claimed she was stuck in traffic. During subsequent visits, the monitor reported Mother continued to appear tired and often

became irate when she suggested Mother read or find activities for S.S. that did not require electronic devices. The monitor also expressed concerns Mother continued to bring junk food for S.S. despite being aware of concerns regarding his weight. At a visit on August 25, 2018, the visitation monitor gave S.S. a bag of donated gifts, including a teddy bear, and S.S. gave the bear to Mother and told her she should keep it, "[s]o, you don't forget me." Mother helped S.S. with his homework. When S.S. asked to watch a DVD, Mother said no, but then allowed him to play games on the computer while she rested her eyes.

S.S. started at a new school in August and began to display disruptive behaviors in class. The foster parents left a note for Mother in S.S.'s backpack regarding the behavioral issues and Mother addressed them with S.S. by speaking to him about boundaries. She then encouraged him to do his homework before playing.

Mother continued to have a set schedule for telephone calls with S.S. but began to miss calls. The missed calls affected S.S. negatively, causing him to resume bedwetting and to withdraw, become emotional, and to worry about Mother. The foster parents asked Mother to provide her work schedule, so they could schedule calls around her work hours, but she did not do so. S.S. often worried about whether Mother would call or show up for visits.

On September 28, 2018, the dependency drug court informed the Agency Mother was being terminated for failing to complete requisite drug testing. Mother also stopped attending therapy. She remained compliant with her probation, but the probation officer

told the Agency social worker Mother did not seem to have much interest complying with any Agency programs.

S.S. continued to be disruptive in school, but the foster parents worked with the school to find appropriate solutions. When informed of the continued issues, Mother said, "Why are you like this? It has to stop. Things happen in life, but we do not get to do bad things because of it. You don't get to express your anger by breaking things that aren't yours." She then told him he could not play a game he had taken out because there were consequences to not completing his schoolwork on time.

In an addendum report dated October 24, 2018, the Agency requested the juvenile court terminate Mother's parental rights and order a permanent plan of adoption. The Agency noted S.S. considered the foster parents' home to be his home and the foster parents were committed and able to provide for him. Although he initially struggled with behavior issues at school, he appeared to be settling in and improving. The Agency noted Mother had abandoned her programs, did not meet S.S.'s daily needs, and could not provide the stability he needed.

F

On October 24, 2018, Mother was arrested for battery and possession of methamphetamines. She had gone to see V.A. against court orders and had spit at and punched V.E when he asked her to leave. The police found two baggies of methamphetamine in Mother's possession and she admitted to using the night before.

Mother was incarcerated from October 24 to November 19, 2018. S.S. sent e-mails, letters and pictures, but Mother did not respond. During this time, S.S.'s behavior in school improved significantly; he had no behavior issues and completed his classwork.

Mother resumed visits with S.S. on December 1, 2018. She told S.S. she did nothing wrong and it was V.E.'s fault she went to jail. She also spoke about other adult topics and S.S. appeared disinterested. After visiting with Mother, S.S. resumed the previous disruptive behaviors in school.

On December 17, the Agency learned Mother had been arrested again for possession of a controlled substance. On December 26, 2018, Mother was sentenced to six months local custody. S.S. initially reached out to Mother through e-mails, letters and pictures, but eventually stopped asking the foster parents to send her anything.

The juvenile court held the 366.26 hearing on January 22, 2019. Mother's counsel argued the parent-child relationship exception applied and a permanent plan of guardianship was more appropriate than adoption. The juvenile court found Mother did have a parent-child relationship with S.S., but the stability of adoption outweighed the benefits of that relationship and was therefore in the best interest of S.S. The court terminated Mother's parental rights and ordered a permanent plan of adoption for S.S.

Mother appeals.

III

DISCUSSION

Mother asserts substantial evidence does not support the trial court's finding the benefits of adoption outweighed the benefits of the parent-child bond. We disagree.

A

Once a juvenile court determines a child cannot be returned to his or her parent, the court's focus shifts towards providing the child with a stable permanent home. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*); *In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*); § 366.26, subd. (a), (b).)

At this point, "the juvenile court has three options: (1) to terminate parental rights and order adoption as a long-term plan; (2) to appoint a legal guardian for the dependent child; or (3) to order the child be placed in long-term foster care." (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) Of those options, adoption is the permanent plan preferred by the Legislature, even though it requires termination of the natural parents' legal rights to the child. (*Autumn H., supra*, 27 Cal.App.4th at pp. 573-574.) Accordingly, where the caregiver is willing and able to adopt the child, the juvenile court must select adoption as the permanent plan unless it finds the termination of parental rights would be detrimental to the child under one of the exceptions enumerated in the statute. (*Ibid.*)

Section 366.26, subdivision (c)(1)(B)(i) provides one such exception to the preference for adoption where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Courts have interpreted this exception as requiring a parent-child relationship that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home." (*Autumn H., supra*, 27 Cal.App.4th at 575.) The juvenile court must conduct an individualized inquiry into the nature of the parent-child

relationship in each case but may consider the following factors: "(1) the age of the child, (2) the portion of the child's life spent in the parent's custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child's particular needs." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467 (*Angel B.*); *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

A parent claiming the exception has the burden of establishing it applies and must prove the child has a significant and positive emotional attachment to the parent. (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039; *In re C.F.* (2011) 193 Cal.App.4th 549, 555 (*C.F.*).) Frequent visits and a bond between the child and the parent are not enough; the parent must demonstrate a positive emotional attachment that would result in harm to the child if severed. (*C.F.*, *supra*, at p. 555; *Autumn H.*, *supra*, 27 Cal. App.4th at p. 575 [positive emotional attachment must be such that child would be greatly harmed].) As a section 366.26 hearing occurs only after the juvenile court has already determined the parent is incapable of meeting the child's needs, the benefits of the parent-child relationship will outweigh the preference for adoption only in extraordinary cases. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

We apply a hybrid standard of review on appeal. (*J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.) We review the juvenile court's findings regarding the existence of a beneficial parental relationship for substantial evidence and review the juvenile court's determination as to whether there is a compelling reason for concluding the termination of parental rights would be detrimental to the child for an abuse of discretion. (*Ibid.*; *In re Anthony B.* (2015) 239 Cal.App.4th 389, 395; see also *Jasmine D.*, *supra*,

78 Cal.App.4th at p. 1351 [practical difference between pure substantial evidence standard of review and hybrid standard of review is insignificant].)

B

Here, substantial evidence supports the juvenile court's finding there was a parent-child relationship between Mother and S.S. S.S. was approximately seven years old when the juvenile court terminated Mother's parental rights. He had lived with Mother for the majority of the first four years of his life and was also returned to her custody from February through December 2017. When he was not in Mother's custody, she visited and called him regularly. Many of their visits were positive and the Agency often noted S.S. loved Mother. (See *Angel B.*, *supra*, 97 Cal.App.4th at p. 467 [listing relevant factors].)

However, substantial evidence also indicates the positive or beneficial effects of the relationship on S.S. were significantly limited as a result of Mother's substance abuse. (See *C.F.*, *supra*, 193 Cal.App.4th at p. 555 [parent must prove positive emotional attachment].) Mother had relapsed multiple times during S.S.'s early childhood, causing significant instability and stress for S.S. When she did have custody of S.S., Mother left him with other caretakers for several months at a time and often neglected to take him to school. More recently, as Mother continued to struggle with her sobriety, her visitation and phone calls became more erratic, causing S.S. to worry and withdraw, and when she did visit, the quality of her time with S.S. had also declined. Mother allowed S.S. to play on electronic devices while she rested her eyes, brought him junk food despite stated health concerns, and made inappropriate promises regarding reunification. Although he

loved Mother, S.S. had come to realize she was not able to provide for his needs.

Accordingly, the Agency concluded Mother represented more of a friendly than parental role to S.S.

Mother contends S.S. was devoted to her and argues his devotion is evidence of a positive emotional connection. To the contrary, much of the evidence Mother points to suggests the instability created by Mother's relapses caused S.S. to worry about Mother and whether he would be able to see her. S.S. often stated Mother was "sick" or "was getting better". He said he cried on his bed when he lived with Mother while she was sick and, although he sometimes said he wanted to live with Mother again, he also said he did not want to live with her if she was "sick". Further, he often had difficulty at the end of visits and expressed anxiety over leaving Mother, even to go to school. These interactions suggest S.S.'s feelings towards Mother were derived more from fear and uncertainty than a positive emotional connection. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 955 [a child's disappointment does not establish a beneficial relationship].)

By comparison, the benefits of adoption were significant. S.S. had bounced around between various caregivers for much of his life, but the foster parents were committed and able to care for him long term. They took him to medical appointments, made sure he attended school, worked closely with the school and his therapist to address behavioral issues, and advocated for his educational needs. As a result, S.S. was comfortable in the home and considered it his own. He called the foster parents "mama" and "papa", discussed upcoming plans with the family, and said that he wanted to stay

with them. In addition, the adoptive parents had maintained a relationship with Mother and planned to continue to support S.S.'s relationship with both Mother and V.A. to the extent feasible.⁵ Accordingly, we agree with the juvenile court's conclusion the stability of adoption outweighed the limited benefits of S.S.'s relationship with Mother.

Mother raises several arguments to the contrary, but we do not find them persuasive. Mother asserts the juvenile court, and respondents, placed too much emphasis on her inability to care for S.S., which is not a factor in the parent-child bond exception, but she fails to recognize the adverse effects her addiction also had on her relationship with S.S. (Cf. *In re Amber M.* (2002) 103 Cal.App.4th 681, 690 [social worker improperly focused on mother's ability to provide a home].) As discussed, S.S. worried about Mother and expressed anxiety over her being "sick". Further, he acted out when Mother missed calls and his behavioral issues at school fluctuated significantly concurrent with his visits with Mother. The foster parents were working closely with the school and S.S.'s therapist to address those issues and, while the permanency of adoption will allow for continued progress, exposing S.S. to continued relapses and uncertainty would be detrimental as there is a significant risk it would derail that progress.

Mother also argues *In re E.T.* (2018) 31 Cal.App.5th 68, in which the court concluded the parent-child bond exception applied despite a substance abuse relapse, is instructive here, but the two cases differ considerably. The mother in *E.T.* had one

⁵ Mother argues it is not proper to assume ongoing contact and we note the juvenile court did not do so but did find the caretaker understood what was in S.S.'s best interests and would likely continue any relationships that would benefit him.

relapse, voluntarily informed her social worker of the relapse, sought help despite being denied resources, gained significant insight into her addiction, and had maintained her sobriety for nine months when the court terminated her parental rights. (*Id.* at pp. 71, 77-78.) By contrast here, Mother had relapsed a number of times, did not seek out assistance until confronted, and, although she has participated in several treatment programs, it does not appear Mother has gained insight into her addiction as she relapsed again shortly before the juvenile court terminated her parental rights. As discussed, the continued relapses and instability had a negative effect on S.S. and his relationship with Mother.⁶

Finally, Mother contends recent studies suggest guardianships can provide as much stability and permanency as adoptions. However, for now, adoption remains the preferred permanency plan of the Legislature and we must follow the law as written. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 573; *In re Celine R.* (2003) 31 Cal.4th 45, 53.) Moreover, the foster parents were not interested in legal guardianship. While another placement was possible, moving S.S. would only create more instability for him.

Accordingly, we conclude substantial evidence supports the juvenile court's findings regarding Mother's relationship with S.S. and the juvenile court did not abuse its discretion in determining the exception in section 366.26, subdivision (c)(1)(B)(i) did not apply as the termination of Mother's parental rights would not be detrimental to S.S.

⁶ Mother also cites a long list of additional cases in which courts applied the exception, but we do not find these cases persuasive here. The juvenile court must weigh the benefits of adoption against the unique nature of the parent-child relationship in each case and, for the reasons discussed, we agree with the juvenile court's analysis in this case. (See, *Angel B.*, *supra*, 97 Cal.App.4th at p. 467.)

IV
DISPOSITION

The order is affirmed.

McCONNELL, P. J.

WE CONCUR:

HALLER, J.

AARON, J.